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THE SCOPE OF COPYRIGHT PROTECTION

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It is provided in the Constitution of the United States that a work, to be copyrightable, must be the "writings" of an "author."[1] The word "writings" is not confined to language or letters, but embraces all forms by which the ideas in the mind of the author are given visible expression.[2] Consequently instruction sheets and diagrams,[3] catalogue cuts,[4] labels,[5] and motion pictures[6] have all been held "writings" within the constitutional provision and the copyright acts. It is definitely settled, however, that the benefits of the copyright law should not be extended to "ideas" as such,[7] systems,[8] the use of words,[9] or the title of a copyrighted work, apart from the work itself.[10] While the present copyright act requires the applicant for a copyright to state in which of an enumerated group of classes his work

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[1] United States Constitution Art. 1, sec. 8.

[2] Barrow-Giles Lithographic Co. v. Barony, 111 U.S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279 (1884).

[3] Ideal Aeroplane and Supply Co. v. Brooks, 18 F. Supp. 136 (1937).

[4] Kaiser & Blair v. The Merchants' Assn., 64 F. (2d) 575 (1933).

[5] Hoague Sprague Corp. v. Meyer Co., 31 F. (2d) 583 (1929).

[6] M. G. M. Distributing Co. v. Bijou Theater Co., 3 F. Supp. 66 (1933).

[7] Affiliated Enterprise v. Gruber, 86 F. (2d) 958 (1936).

[8] See note 7, supra.

[9] Holmes v. Hurst, 174 U.S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606 (1899). Otherwise an author might gain a monopoly in certain words. The order in which the words are employed is, of course, protected.

[10] "Neither the author nor proprietor of a literary work has any property in its name. It is a term of description which serves to identify the work." Black v. Ehrich, 44 Fed. 793 (1891). In Kemp & Beatley v. Hirsch, 34 F. (2d) 291 (1929), the court held a design for dress goods stamped on paper or on the goods themselves, was not the subject of copyright, in spite of the plaintiff's contention that his matter was a design for a work of art within the meaning of Sec. 5 of the Copyright Act of March 4, 1909, the court construing this section as applying *only* to the so-called fine arts, i.e., paintings, drawings, and sculpturing. The decision was undoubtedly influenced, by the fact that the plaintiff might be accorded adequate protection by obtaining design letters patent, the court obligingly calling this to the plaintiff's attention.

belongs,[11] nevertheless it is specifically provided that these specifications shall not be deemed to limit the subject matter of copyrightable material previously defined[12] as any writings of an author.

Thus we see that Congress has used the broadest terms possible for the extention of the benefits of the Copyright Act to diverse subject matter. We must look to the decided cases in this field, however, for the determination of the requisites which this subject matter must embody.

There are two fundamental requirements, originality and merit. Since no examination is made at the copyright office as to these factors it is of the utmost importance that the court investigate both.[13] It is, accordingly, the function of this paper to analyze the decisions of the courts in an attempt to ascertain recent trends in the standards demanded by the courts in both these requirements.

Many decisions use these terms interchangeably, although the two have distinctly separate meanings. It is this confusion of terminology together with utter failure on the part of the courts, in many of the more recent cases, to realize that *they are applying these tests to the facts,* that cause confusion to one who is unfamiliar with the field and who is attempting to determine for himself the question, whether or not, some particular work at hand is susceptible to a valid copyright.

If we are to be systematic and formulate some definitely helpful rules in this field we must first examine the contested work to determine whether or not it embodies sufficient original-

[11] Act of March 4, 1909, sec. 5. "(a) Books, including composite and cyclopedic works, directories, gazeteers, and other compilations; (b) Periodicals, including newspapers; (c) Lectures, sermons, addresses (prepared for oral delivery); (d) Dramatic or dramatico-musical compositions; (e) Musical compositions; (f) Maps; (g) Works of art; models or designs for works of art; (h) Reproductions of a work of art; (i) Drawings of plastic work of a scientific or technical character; (j) Photographs; (k) Prints and pictorial illustrations; (l) Motion-picture photoplays; (m) Motion pictures other than photoplays."

[12] Act of March 4, 1909, sec. 4.

[13] "A deposit of two copies of the article or work with the Librarian of Congress with the name of the author and its title page is all that is necessary to secure a copyright. It is therefore much more important, that when the supposed author sues for a violation of his copyright the existence of those facts of originality or intellectual production of thought and conception on the part of the author should be proved then as in the case of patent rights." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279 (1884).

ity; if the work should pass this examination it must still be tested under the rules laid down by the second fundamental requirement, that of merit.

I. ORIGINALITY

Whenever the abstract rule is laid down by some court that this or that work has or has not sufficient originality to entitle it to a valid copyright perhaps the first thought that comes to mind is that the propounder of the work has so plagiarized some matter previously published that the courts do not feel his work rises to the dignity of a copyright. It seems quite natural therefore, to find courts laying down the rule that a plagiarist is not an author.[14]

But if we assume that the courts use originality in the sense that the work, to be copyrightable, must not be a plagiarism, we must seek the limits of this term and ask ourselves the question, what have the courts considered plagiarism?

When one copies the work of another he

(a) has copied a work which is in the public domain. This can either,
  (1) be traced definitely as the product of a known author, who has neglected to copyright his work or in which a valid copyright has expired, or,
  (2) can be designated as a part of that great fund of knowledge, the common heritage of mankind, including traditional plots, folk lore, historical facts, etc.; or,

(b) has infringed upon the valid copyright of another.

In the first case, (a), the plagiarist is simply denied a copyright; in the second, (b), he is also subject to a suit by the party holding the valid copyright of the infringed work. In either case, what is important to us is that the work is not entitled to a valid copyright because a direct or substantially similar copy of something in the public domain[15] or something previously

[14] Sheldon v. M.G.M. Pictures Corp. 81 F. (2d) 49, cert. den. 298 U.S. 669, 56 Sup. Ct. Rep. 835, 80 L. ed. 1392 (1936).

[15] Act of March 4, 1909, sec. 7 provides that no copyright shall subsist in the original text of any work which is in the public domain. This, of course, was no innovation. It should also be noted that by this same section no copyright can be secured for matter appearing in any publication of the United States Government. See also Rule 4, Copyright Office.

validly copyrighted will not support a copyright. A distinguishable variation from one of the above classes, however, will support a copyright, even though it present the same old theme.[16]

No attempt can here be made to lay down the rules concerning what is a distinguishable variation. Each case must stand upon its own facts as to how near the details and incidents of one work can come to the other before the line of plagiarism is crossed. We wish here, merely to make the point that a distinguishable variation is not a plagiarism and is not, therefore, refused copyright for lack of originality.

Another class of cases wherein it is definitely decided that the author is not guilty of such plagiarism or unoriginality as to forfeit valid copyright in his work are those cases wherein the author has so combined some subject matter in the public domain that *his combination* is readily distinguishable from *all other combinations* in the public domain. This situation is aptly illustrated in the interesting case of *Carr v. Nat'l. Capitol Press.*[17] There the plaintiff's card contained Gilbert Stuart's portrait of George Washington in an inconspicuous oval frame occupying about one-third of the card. In the upper left hand corner of the card was a spread eagle standing on the United States Shield with the customary stars in a blue field across the top and vertical red and white stripes comprising the lower portion of the shield. Below the shield in large type was the lettering

George Washington
Bicentennial
1732 1932

Defendant's card comprised a similar portrait of Washington in the same inconspicuous oval frame and occupying about one-third of the card on the right side. Across the upper left of the card was a spread eagle below which was the outline of a large shield and within the shield was printed the American's Creed in eighteen lines of small type. In a suit for infringement the court held that the principal features of the plaintiff's cards (con-

[16] Gerlach-Barklow Co. v. Morris & Bendien, 23 F. (2d) 158 (1927). It should be noted that a theme is never copyrightable. See Shipman v. R.K.O. Radio Pictures, 20 F. Supp. 249 (1937).

[17] 71 F. (2d) 220 (1934).

sisting of the portrait and the United States Shield) were not susceptible to exclusive appropriation. The court said further:

"The most the plaintiff can rightfully claim is that she has evolved an original combination of matter, which standing alone would not be subject to a copyright."

The court decided that the defendant's combination was not similar enough to infringe the plaintiff's and in so deciding, of course, decided that the plaintiff had a valid copyright in the *combination or arrangement* of the common subject matter.

Continuing the principle that an author can obtain a valid copyright in his *arrangements* of matter publici juris, we find the case of *Jewelers Circular Pub. Co. v. Keystone Pub. Co.*,[18] illustrative of the point. There the plaintiff's work contained 1,250 trade-mark illustrations, and the court held the fact that each one of them taken alone might not be copyrightable, failed to establish the proposition that taken together they may not be copyrighted.

A third situation, which is but slightly different from original arrangements of matter in the public domain, is that wherein the author has taken facts in the public domain and expressed them in original fashion. Thus the form in which news is printed can be protected though the news itself cannot be;[19] the modes of expression in which the conventional laws or rules of a game may be stated, but not the rules themselves;[20] the language used in presenting a particular problem in the playing of Contract Bridge, but not the particular distribution of the 52 cards in the problem.[21] Historical events, certainly a typical example of matter in the public domain, of course could not be copyrighted;[22] but no one would doubt for an instant the copyrightability of a treatise on some phase of history. In fact, it has been held that a volume which shows readily the order of historical events, cannot be reproduced without the author's permission if the author has copyrighted his work.[23]

In holding that a pictorial history of the United States was

[18] 281 Fed. 83 (1922); see also in this connection Guthrie v. Curlett, 36 F. (2d) 694 (1929).
[19] Chicago Record Herald Co. v. Tribune Assn., 275 Fed. 797 (1921).
[20] Whist Club v. Foster, 42 F. (2d) 782 (1929).
[21] Russell v. Northeastern Publishing Co., 7 F. Supp. 571 (1934). See also Hartfield v. Peterson, 91 F. (2d) 998 (1937).
[22] Caruthers v. R.K.O. Radio Pictures, 20 F. Supp. 903 (1937).
[23] Hamson v. Jaccard Jewelry Co., 32 Fed. 202 (1887).

the proper subject of a valid copyright, the court in *Yale University Press* v. *Row, Peterson Co.*[24] stated that the right to copyright a book did not depend upon whether or not the materials collected were publici juris as long as the matter was treated in an original fashion. "The manner in which the author presented that material" said the court, "was copyrightable." Similarly, a copyright may be had for an abridgement, digest, translation, or dramatization,[25] the test here being the originality represented by the author's own thought, skill and labor, in ingeniously presenting another's work.

From what has been said it would seem almost needless to point out that a writer may draw from all available sources in creating his writings, and this will in no way effect his ability to secure a copyright in the work. If this were not true the first examiner of ancient chronicles might secure for himself a monopoly upon some particular phase of ancient history.[26] A rule has been stated in this connection which seems to find much favor in recent cases: As long as the author of a second work has not copied his predecessor's work, as distinguished from copying their common material, his predecessor cannot complain because the former has achieved the same or an essentially similar result. He cannot complain even though his work by indicating the common sources has facilitated or led to consultation of those works by his successor. The scope of copyrighting

[24] 40 F. (2d) 290 (1930).

[25] In the extremely interesting case of Rush v. Oursler, 39 F. (2d) 468 (1930), the plaintiff's stage production involved a unique dramatic incident, in which the audience is made to believe that an actual murder was committed in their midst. In holding that this was a dramatic incident which, per se, is not copyrightable (no one could obtain a copyright to withdraw from others the right to portray such an occurrence in literary form) the court said: "The only right the owner of such a copyright would have, is the right to prevent others from copying the form in which the author has chosen to dramatize such an occurrence for the production on the stage. It is not the contents or a dramatic or literary composition which is protected by copyrighting but the form and sequence, the incidental, yet, essential adornment and trimmings. *It is not the subject but its treatment that is protected.*" In Roe-Lawton v. Hal E. Roach Studios, 18 F. (2d) 126 (1927), the same conclusions were reached in regard to photoplays.

[26] "Many of the plays of Shakespeare were framed out of materials which existed long before his time and were gathered by him from ancient chronicles, and other dusty receptacles of antiquated literature, but these dry bones of the past, the poet combined anew, pouring over them the effulgence of his own genius until they were quickened with new life and adorned with hitherto unknown beauty." Boucicault v. Fox, 3 Fed. Cas. 977 (1862).

in such works is limited so as simply to prevent a subsequent laborer in the same vineyard from seeking to save time or trouble by copyrighting his predecessor's work. The drawing upon available sources and the use of old material by an author doesn't exclude others from using the same sources and materials.[27]

In summation then, a work may be original in the sense of the law although the materials of which it is composed can all be traced out of former works, provided the author by the exercise of selection, arrangement, combination, editing, or substantially coloring the facts so as to pour into them his own genius, has created something substantially new. This may be done in the form of a distinguishable variation, an original combination, or merely stating matter in the public domain in an original manner. Conversely put, one who exercises no mental power[28] in the production in concrete form, of an intelligible conception, but rather slavishly reproduces another's work is not entitled to copyright his plagiarism.[29]

II. MERIT

The courts have set up two standards as to the requirement that a work, to be copyrightable, must embody some intrinsic merit. The first of these may be designated as the *Expenditure*

[27] Weil on the Law of Copyrighting, sec. 629, p. 234, cited in Yale University Press v. Row, Peterson Co., 40 F. (2d) 290 (1930).

[28] The Supreme Court ruled in the Trade Mark Cases 100 U.S. 82, 25 L. ed. 550, that the writings to be protected under the Constitutional provision are only such as are original and are founded in the creative powers of the mind and consequently do not include trade marks which require neither novelty, invention, nor any work of the brain but are simply founded on priority of appropriation.

[29] An interesting and important distinction between patents and copyrights on the score of originality bears consideration. In the case of patents, the patentee must be the original and first inventor or discoverer. In the case of copyrights it is possible to have a plurality of valid copyrights directed to closely identical or even identical works and none of them, if independently arrived at without copying, will constitute an infringement of the copyright in any of the others. In Sheldon v. M.G.M. Pictures Corp., 81 F. (2d) 49 (1936); cert. den. 288 U.S. 669, 80 L. ed. 1392, 56 Sup. Ct. Rep. 835, Learned Hand, J., said: "If by some magic, a man who had not known it, were to compose a new Keats' 'Ode to a Grecian Urn,' he would be an author and if he copyrighted it, others might not copy that poem, though they might, of course, copy Keats'. The copyright, therefore, is valid but there can be no infringement." Independent translations of the same work are necessarily very similar but each is entitled to copyright. See in this connection, Stevenson v. Fox, 226 Fed. 990 (1915).

of Labor Theory, and the second we shall call the *Reasonable Skill Theory.*

Although the two conflict on principle, no decision has been discovered which recognizes their incongruity. When one is expounded the other is completely ignored; where one is adopted it is considered as the only solution of the presented problem. Nevertheless the two are definitely present in our body of copyright law and must be dealt with if we are to set up standards for ascertaining in what cases a valid copyright may be obtained in some contested work. It remains to examine these theories; ascertain the cases in which one or the other has been adopted and hazard a generalization as to their future application.

Expenditure of Labor Theory

Under this theory any work upon which labor has been expended is entitled to copyright, regardless of the intrinsic merit imbued in it, provided of course it has satisfied the other copyright requirement of originality. The heart of the theory seems succinctly put in *Boucicault* v. *Fox.*[30] The court there said, in substance, that the copyright law rests on no code of comparative criticism but protects alike the humblest efforts at instruction or amusement, the dull productions of plodding mediocrity, and the most original and imposing displays of intellectual power, and that it should be liberally construed in favor of authors, leaving the comparative merits to be settled at the tribunal of public opinion; "For," said the court, "this will keep open the springs of thought which feed the intellectual life of the nation."

The courts under this view do not assume the functions of critics. They do not measure carefully the degree of literary or artistic skill involved in the production. Their attitude is that if the work has enough merit and value to be the subject of piracy, it should also be of sufficient importance to be entitled to protection.[31]

The recent case of *Leon* v. *Pacific Telephone & Telegraph Co.*[32] sets forth the arguments in favor of this theory in a con-

[30] Fed. Cas. No. 1,691 (1862).

[31] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 47 L. ed. 460, 23 Sup. Ct. Rep. 298 (1903); Henderson v. Tompkins, 60 Fed. 758 (1894).

[32] 91 F. (2d) 484 (1937).

vincing manner. In holding that the plaintiff's telephone directory was susceptible to valid copyright, the court stated first of all that such compilations were specifically made copyrightable by the Copyright Act;[33] secondly, the court adopted the following argument against denying relief: Should the courts give boundary to the Constitutional grant and deny the protection of the copyright statute except where intrinsic merit manifested itself, many of the writings to which protection ought to be given, as a matter of policy, must be excluded.[34] Here, as elsewhere, the constitution, under judicial construction has expanded to new conditions as they arose. Little by little copyrights have been extended to the literature of commerce so that now it includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide books, directories, and other works of similar character. It would seem that nothing which evinces in some substantial way the mind of the creator or originator, is excluded.

A belief that in no other way can the labor of the brain in these useful departments of life be adequately protected is doubtless responsible for such a wide departure, in this case, from what unquestionably was the original purpose of the constitutional provision. But obviously, even under this view, the expansion process must come to a halt at some point, and the *Leon* case, though the language is anything but plain upon this point, seems to draw the line at the recital of events in the form of annals; the reduction to copy of an event that others, in a like situation, would have observed in such form as people generally would have adopted. Similarly courts have denied copyright protection where the article is published, not for information or explanation, but for use itself, such as blank forms, letter files, indices, and similar mere conveniences and devices for the conduct of business.[35]

The courts, in recent years, have been more inclined to adopt the *Expenditure of Labor Theory* in advertising cases than in any other field. The case of *Anshel* v. *Puritan Pharmaceutical Co.*[36] aptly illustrates this tendency. The plaintiff, a dealer in

[33] Act of March 4, 1909, sec. 5, sub sec. (a).

[34] Of course at the time the constitution was adopted the question of applying copyright protection to other than strictly literary productions had never been propounded.

[35] Amberg File & Index Co. v. Shea Smith Co., 82 Fed. 314 (1897).

[36] 61 F. (2d) 131 (1932).

cosmetics and toilet articles bearing the trade name "Vivani," prepared a distinctive advertisement composed of a group of photographs of articles to be sold together with descriptive matter. He secured a copyright registration and published his advertisement with notice of copyright in various newspapers. The defendant, who was engaged in selling similar articles, published an advertisement of its products which was similar, in wording and in general arrangement, to that of the plaintiff's copyrighted advertisement. Plaintiff brought suit for infringement, and the defense was pleaded that there was not sufficient merit to the plaintiff's advertisement to warrant the procurement of a valid copyright therein. The court ignored the merit plea in toto and laid down the rule that a newspaper advertisement having some degree of originality is the proper subject of copyright. Whether the liberality in this field was produced by the strong language found in *Bleistein* v. *Donaldson Lithographing Co.*[37] or by the ability of big business to hire counsel of sufficient prowess to convert the courts to the views of their clients is of course problematic. The latter thought, however, is somewhat weakened by the fact that advertising men do not themselves consider plagiarism as a serious offense but apparently accept it as a part of the business game.[38] Since modern economic theorists tend to discourage rather than encourage advertising on

[37] 188 U.S. 239, 47 L. ed. 460, 23 Sup. Ct. Rep. 298 (1903). It had been formerly held that if an illustration or a pamphlet containing illustrations had no other purpose than that of a mere advertisement, it was not promotive of the useful arts within the meaning of the copyright constitutional provision so as to be a proper subject of copyright. Mott Iron Works v. Clow, 104 Fed. 316 (1897). However the Bleistein case, which is the leading case representing the modern and more liberal view, held that a circus poster which served no other purpose than to advertise, was the proper subject of copyright. However it should be noted that the Bleistein case held merely that if the work was otherwise subject to copyright it was not defeated in this purpose because it was an advertisement. "A picture is none the less a picture", said the court, "and none the less a subject of copyright, that it is used for an advertisement." The Anshel case goes much further, in that it dispenses altogether with the requirement of merit and allows the valid copyrighting of an advertisement so long as it has some slight degree of originality whether it is peculiarly illustrated or is merely a compilation of information. To the same effect see: Norris v. No-Leak-O Piston Ring Co., 277 Fed. 961 (1921); De Prato Statuary Co. v. Giulaina Statuary Co., 189 Fed. 90 (1911).

[38] How 8,000 Imitators Contributed to Canada Dry's Success, 11 Sales Management 25, July 10, 1926.

large scale proportions,[39] it would seem better to curtail this liberal tendency.

Under the *Expenditure of Labor Theory,* then, the Constitutional copyright grant is viewed as having expanded to meet new conditions as they arose and since the courts which adopt this theory feel that there is a definite need for the protection of the literature of commerce, the only test of merit set up is: Did the applicant actually embody sufficient labor into his work to earn for himself the reward of copyright? The process of expansion in this direction seems however to stop at the point where the article is published, not for information or explanation, but for use itself, or where the recordation is that of a mere annal.

Reasonable Skill Theory

Under this theory, the work must evince in its make-up some definite mental endowment in order to show "authorship" within the meaning of the constitutional copyright grant.[40] Thus it would seem that notations at which stocks or serials have sold or of the result of a horse race or a baseball game could not be said to bear the impression of merit, though they embodied labor in their collection and presentation, and therefore fail to rise to the plane of authorship.[41]

Accordingly the court in *West Publishing Co.* v. *Thompson Co.*[42] decided that the aggregation of old material into a single publication does not amount to ordinary skill sufficient to lend copyrightability. It was held that the mere aggregation of the Weekly Reporters into volumes does not constitute a new work. But the compilation and rearrangement and reclassification of the syllabi in the digest into a new and larger digest does constitute a new work entitled to copyright.[43]

Just as the field of advertisement seemed to have peculiarly lent itself to the *Expenditure of Labor Theory,* the field of music has in recent years, been made the exclusive territory of the *Reasonable Skill Theory.* The theory is, of course, invoked more frequently where arrangements of music in the public domain

[39] Your Money's Worth, Chase and Schlink.
[40] United States Constitution, Art. I, sec. 8.
[41] Natl. Tele. News Co. v. Western Union Tele. Co., 119 Fed. 294 (1902).
[42] 176 Fed. 837 (1910).
[43] West. Pub. Co. v. Thompson, supra, note 42.

are in question. It seems almost the universal rule that for an arrangement to be copyrightable it must be a substantially new adaptation of the composition. Accordingly in *Arnstein* v. *The Marx Music Corp.*[44] the court held that a musical work to be copyrighted must indicate an exercise of *inventive powers* as distinguished from mere mechanical skill or change.

The case of *Norden* v. *Oliver Ditzen Co.*[45] is an interesting one and seems characteristic of the stringent standard of merit demanded of musical compositions. There the plaintiff wrote original words for an old Russian hymn in the public domain. These words necessitated rythmical changes in the music to the extent of the number of syllables used in the Russian version. The defendant used the plaintiff's music in toto and wrote original words. An infringement suit was started and the court held that music, to be copyrightable, must be substantially new and meritorious work. Changes simply in the length of notes and not in the original harmony do not involve sufficient merit to warrant a copyright, and the plantiff was consequently denied relief.

The courts which adopt this, the *Resasonable Skill Theory*, then, take the attitude that since copyrights are dispensed under the Constitutional grant of power, "to promote the progress of science and the useful arts",[46] a work to be copyrightable must not only be useful but also must possess literary or artistic merit. Copyrights, under this view, are not for the encouragement of mere industry, unconnected with learning and the sciences.

Which of these theories will be applied to a contested work seems a puzzling question indeed since no court has, as yet, marked our path with sign posts determining what factors will bring a work under one or the other of these rules. The only rationale offered is that the courts will apply whichever of these theories seem to them the most expedient in any given situation. Further than the generalization that public policy governs the courts in their choice, we cannot go. However, we may venture

[44] 11 F. Supp. 535 (1935). The plaintiff alleged defendant's selection "Play Fiddle Play" infringed his composition "I Love You Madly". The court held that the defendant had not proved his contention that plaintiff's composition was not original and that certain combinations of notes of melodies in it were to be found in previous musical compositions of some of the great music masters of the past.

[45] 13 F. Supp. 415 (1936).

[46] Art. I, sec. 8.

the assertion that where the work is one which has been considered historically as within the scope of copyright protection, that is, drama, music, literature, and the fine arts, the courts are inclined to adopt the stricter *Reasonable Skill Theory;* while if the work is not one which might be considered within the historical scope of copyright protection so as to have been within the general purview of the framers of the Constitutional provision concerning copyrights, a more liberal tendency has been gradually evinced, evoluting into the *Expenditure of Labor Theory*. This tendency seems to have been brought about by a strong feeling on the part of the courts that *some* type of protection should be afforded the labor of mankind in important departments of social intercourse, which exact of their laborers routine performance rather than imposing displays of intellectual prowess, and that the copyright niche in our legal jurisprudence seems best fitted to afford it.

III. CLEAN HANDS

Regardless of which of the two theories of merit a court may deem expedient to adopt it is on all hands agreed that an immoral or indecent[47] or seditious or libelous[48] work is not entitled to copyright protection. Moreover, if an author has been guilty of inequitable conduct in the production of his work the benefits of the copyright law will not be extended to him.[49] Before such protection will be refused, however, it must be shown that there is something immoral, pernicious, or indecent in the work per se, or that it is incapable of any use except in connection with some illegal or immoral act.[50] By the same token advertisements which do not faithfully describe the wares of the vendor, but tend rather to mislead and deceive are denied protection.[51] We find relaxation of the Clean Hands Doctrine, how-

[47] Barnes v. Miner, 122 Fed. 480 (1903).

[48] Harms v. Stern, 231 Fed. 645 (1916).

[49] However, the meretricious conduct must be definitely connected with the matter in controversy. See Corey v. Physical Culture Hotel, 14 F. Supp. 977 (1936), where the court intimates that trespassing upon the regulations of the Department of Air Commerce, in order to secure an aerial photograph, is not conduct so definitely affecting the plaintiff's copyright as to destroy its validity.

[50] Richardson v. Miller, Fed. Cas. No. 11,791 (1877).

[51] Stone & McCarrick, Inc. v. Dugan Piano Co., 220 Fed. 837 (1915).

ever, in the recent case of *Simonton* v. *Gordon*.[52] It was there held that a copyright will be protected in a work on the borderline of indecency when the copyright is contested by the author of an equally questionable work.

[52] 12 F. (2d) 116 (1929).